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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/509,535	08/07/2000	KRZYSZTOF D. MALOWANIEC		1566

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FELIX J D'AMBROSIO  
JONES TULLAR & COOPER  
PO BOX 2266  
EADS STATION  
ARLINGTON, VA 22202

EXAMINER

NORDMEYER, PATRICIA L

ART UNIT

PAPER NUMBER

1772

DATE MAILED: 07/14/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No.	Applicant(s)	
	09/509,535	MALOWANIEC ET AL.	
	Examiner	Art Unit	
	Patricia L. Nordmeyer	1772	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 15 May 2003.

2a) This action is FINAL. 2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 22-47 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 22-47 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11) The proposed drawing correction filed on \_\_\_\_\_ is: a) approved b) disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12) The oath or declaration is objected to by the Examiner.

#### Priority under 35 U.S.C. §§ 119 and 120

13) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All b) Some \* c) None of:

1. Certified copies of the priority documents have been received.

2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.

3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) The translation of the foreign language provisional application has been received.

15) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

#### Attachment(s)

1) Notice of References Cited (PTO-892)

2) Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_

4) Interview Summary (PTO-413) Paper No(s) \_\_\_\_\_

5) Notice of Informal Patent Application (PTO-152)

6) Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Withdrawn Rejections***

1. The 35 U.S.C. 112 rejection of claim 38 of record in Paper #15, Page 2, Paragraph 3 has been withdrawn due to Applicant's argument in Paper #17.

### ***Repeated Rejections***

2. The 35 U.S.C. 102 rejection of claims 22, 26 – 37, 40 – 41, 44 and 45 as anticipated by Tapp is repeated for reasons previously of record in Paper #15, Pages 3 – 4, Paragraph #5.

Tapp discloses a composite material formed with microporous film and at least one layer of a non-woven web of stable fibers (Column 2, lines 46 – 55), wherein layer comprised of fibers have diameters not greater than 10 microns (Column 18, lines 6 – 9). The film layer is placed on one side of the fiber layers to form a disposable hygiene article such as a diaper (Column 29, lines 1 – 9). The layers are thermobonded together, forming the three layer composite (Column 26, lines 64 – 68), which inherently causes the third layer to penetrate the surface structure of the first layer and reducing the mean spacing between the third layer and the film layer. An overall weight per unit surface area of the composite is 30 to 200 g/m<sup>2</sup> (Column 27, lines 11 – 14), wherein the weight of the third layer is 5 to 70 g/m<sup>2</sup> (Column 17, lines 66 – 68) and the weight of the first layer is 10 to 30 g/m<sup>2</sup> (Column 17, lines 41 – 44). The film layer contains micropores with diameters of 0.2 to 20  $\mu$ m in a film layer (Column 11, lines 35 – 40) with a thickness of between 5 and 1000  $\mu$ m (Column 16, lines 38 – 42) that allows the transfer of water vapor while

being impermeable to liquid (Column 27, lines 43 – 47). Since Tapp discloses the composite material with the diameters of the individual fibers, the weight per surface area of the fibers and the film layer with micropores of a certain diameter, it would be inherent that the composite would have a tear strength of at least 15 N/25 mm.

Regarding the limitation of providing the second layer be a melt-blown process in claim 22, the determination of patentability for a product-by-process claim is based on the product itself and not on the method of production. If the product in the product-by-process claim is the same or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process. *In re Thorpe*, 227 USPQ 946, 966 (Fed. Cir. 1985) and MPEP §2113. In this case, the limitation of the film formed by a melt-blown process is a method of production and therefore does not determine the patentability of the product itself. Process limitations are given little or no patentable weight. The method of forming the product is not germane to the issue of patentability of the product itself. Further, when the prior art discloses a product which reasonably appears to be either identical with or only slightly different than a product claim in a product-by-process claim, the burden is on the Applicant to present evidence from which the Examiner could reasonably conclude that the claimed product differs in kind from those of the prior art. *In re Brown*, 459 F.2d 531, 173 USPQ 685 (CCPA 1972); *In re Fessman*, 489 F.2d 742, 180 USPQ 324 (CCPA 1974).

3. The 35 U.S.C. 103 rejection of claims 23 – 25, 38, 39, 46 and 47 over Tapp in view of Braun et al. is repeated for reasons previously of record in Paper #15, Pages 4 – 6, Paragraph #7.

Tapp discloses the claimed composite material above except for the second film layer being breathable but liquid proof and the second film layer being permeable to water vapor through the process of chemisorption.

Braun et al. discloses a nonporous poly(vinyl alcohol) film that transports water molecules through the film layer by means of solubility (Column 10, lines 36 – 51) in a breathable, multi-layered barrier (Column 7, lines 20 – 21) with a fiber layer that is used for an outer cover in absorbent articles (Column 1, lines 37 – 45) for the purpose of removing moisture away from the surface of the skin of the user to avoid diaper rash and giving the article aesthetic qualities (Column 1, line 59 to Column 2, line 2).

It would have been obvious to one of ordinary skill in the art at the time the applicant's invention was made to have provided the nonporous film of poly(vinyl alcohol) in Tapp in order to remove moisture away from the surface of the skin of the user to avoid diaper rash and giving the article aesthetic qualities as taught by Braun et al.

Regarding claims 23 - 25, Tapp discloses the microfiber layer, the third or outside layer, to be made of fibers with diameters less than 10  $\mu\text{m}$ . Therefore, one of ordinary skill in the art through routine experimentation could determine the diameter of the fiber which gives the retention or adhesion force of the hook material. The diameter of the microfibers is deemed to be a cause effective variable with regard to the retention or adhesion force of the hook material to the outside of the composite material. It would have been obvious to one having ordinary skill

in the art to have determined the optimum value of a cause effective variable such as diameter of the microfibers through routine experimentation in the absence of a showing of criticality in the claimed microfiber diameter. *In re Boesch*, 205 USPQ 215 (CCPA 1980), *In re Woodruff*, 16 USPQ2d 1934, 1936 (Fed. Cir. 1990).

Tapp, as modified with Braun et al., discloses the claimed invention except for the microfiber being disposed on the outside of the backing sheet. It would have been obvious to one having ordinary skill in the art at the time the invention was made to place the microfiber on the outside of the backing sheet to give the outside of the article a soft feel, since it has been held that rearranging parts of an invention involves only routine skill in the art. *In re Japikse*, 86 USPQ 70.

#### ***Response to Arguments***

4. Applicant's arguments filed in Paper #17 have been fully considered but they are not persuasive.

In response to Applicant's argument that Tapp fails to disclose a three dimensional penetration of the third layer into the first layer such that the mean spacing  $D^1$  between the third layer and the second layer is less than the thickness  $D_{sp}$  of the first layer, Tapp, discloses that the three layers of materials of the diaper are thermobonded together (Column 26, lines 64 – 68). When thermobonding is used to attach items together, layers are melted together at that location, thereby causing the third layer to "penetrate" into the first layer. The spacing between the

second and third layer would also be less than the thickness of the first layer because the layer are melted together at the location of the thermobonding, thereby making the thickness less due to the absence of air space in the layers.

***Conclusion***

5. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Patricia L. Nordmeyer whose telephone number is (703) 306-5480. The examiner can normally be reached on Mon.-Thurs. from 7:00-4:30 & alternate Fridays.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Harold Y. Pyon can be reached on (703) 308-4251. The fax phone numbers for the

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organization where this application or proceeding is assigned are (703) 872-9310 for regular communications and (703) 872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

Patricia L. Nordmeyer  
Examiner  
Art Unit 1772

*pln*  
pln  
July 10, 2003



WILLIAM P. WATKINS III  
PRIMARY EXAMINER